

Citimortgage, Inc. v Dombroski
2015 NY Slip Op 30103(U)
January 20, 2015
Supreme Court, Suffolk County
Docket Number: 09-21374
Judge: Emily Pines
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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY**

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 9-26-13
ADJ. DATE 1.20.15
Mot. Seq. # 001 - MG

-----X
CITIMORTGAGE, INC.
1000 Technology Drive
O'Fallon, MO 63368-2440

Plaintiff,

- against -

DIANA DOMBROSKI, CHARLES A. LOISEAU
A/K/A CHARLES LOISEAU, PRIMUS
AUTOMOTIVE FINANCIAL SERVICES INC,

JOHN DOE (Said name being fictitious, it being
the intention of Plaintiff to designate any and all
occupants of premises being foreclosed herein,
and any parties, corporations or entities, if any,
having or claiming an interest or lien upon the
mortgaged premises.)

Defendants.
-----X

ROSICKI, ROSICKI & ASSOCIATES, P.C.
Attorneys for Plaintiff
26 Harvester Avenue
Batavia, NY 14020

STIM & WARMUTH, P.C.
Attorneys for Defendants
DIANA DOMBROSKI and CHARLES A.
LOISEAU A/K/A CHARLES LOISEAU
2 Eighth Street
Farmingville, NY 11738

Upon the following papers numbered 1 to 22 read on this motion for summary judgment and an order of reference;
Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; ~~Notice of Cross Motion and supporting papers~~ _____;
Answering Affidavits and supporting papers 14 - 17; Replying Affidavits and supporting papers 18 - 20; Other 21 - 22; ~~(and~~
~~after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by plaintiff CitiMortgage, Inc. (Citi) pursuant to CPLR 3212 for
summary judgment on its complaint against defendants Charles A. Loiseau a/k/a Charles Loiseau and
Diana Dombroski (collectively referred to as defendants), fixing the defaults as to the non-appearing,
non-answering defendants, for *nunc pro tunc* relief, to amend the caption of this action pursuant to

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CPLR 3025 (b), for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted to the extent set forth herein; and it is further

ORDERED that the caption is hereby amended by substituting Will Loiseau, Immacula Michele in place of “John Doe” and by striking therefrom all remaining “John Doe” defendants; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

CITIMORTGAGE, INC.
1000 Technology Drive
O’Fallon, MO 63368-2440

Plaintiff,

- against -

DIANA DOMBROSKI; CHARLES A. LOISEAU
A/K/A CHARLES LOISEAU; FORD MOTOR
CREDIT COMPANY S/H/A PRIMUS AUTOMOTIVE
FINANCIAL SERVICES INC; IMMACULA
MICHELE; WILL LOISEAU,

Defendants.

This is an action to foreclose a mortgage on property known as 27 Fife Drive, Coram, New York. On January 18, 2006, defendant Dombroski executed a note in favor of Flagstar Bank, FSB (Flagstar) agreeing to pay the sum of \$292,500.00 at the yearly rate of 6.500 percent. On said date, defendants executed a mortgage in the principal sum of \$292,500.00 on the subject property. The mortgage indicated Flagstar to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Flagstar as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on March 15, 2006 in the Suffolk County Clerk’s Office. By assignment dated June 1, 2009, MERS, as nominee for Flagstar, assigned the note and mortgage to plaintiff, Citi. The assignment of mortgage was recorded on July 9, 2009 in the Suffolk County Clerk’s Office.

Plaintiff sent a notice of default dated January 30, 2009 to defendant Dombroski stating that she had defaulted on her mortgage loan and that the amount past due was \$5,371.76. As a result of defendant Dombroski’s continuing default, plaintiff commenced this foreclosure action on June 8, 2009. In its complaint, plaintiff alleges in pertinent part that defendant Dombroski breached her obligations

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under the terms of the note and mortgage by failing to make her monthly installment due on December 1, 2008. Defendants interposed a verified answer with affirmative defenses.

The Court's computerized records indicate that the last foreclosure settlement conference was held on September 7, 2011 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conferences are required.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things: the sworn affidavit of Zachariah Wright, vice president-document control of Citi; the affirmation of Richard Fay, Esq. in support of the instant motion; the affirmation of Richard Fay, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11) the pleadings; the note, mortgage and an assignment of mortgage; notices pursuant to RPAPL 1320 and 1303; affidavits of service for the summons and complaint; and, an affidavit of service for the instant summary judgment motion upon defendants. Defendants have submitted opposition to the summary judgment motion.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*see Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial on their defenses (*see Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]). Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]).

Here, plaintiff has established its *prima facie* entitlement to summary judgment against the answering defendants as such papers included a copy of the mortgage, the unpaid note together with due evidence of defendants’ default in payment under the terms of the loan documents (*see Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]).

The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see U.S. Bank of N.Y. v Silverberg*, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Because “a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation” (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d

909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]), a mortgage passes as an incident of the note upon its physical delivery to the plaintiff. Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (*see* UCC § 3-202; § 3-204; § 9-203[g]). Here, Zachariah Wright avers that at the date of commencement of this action, Citi was the holder of the note. The plaintiff has thus established, *prima facie*, its standing to prosecute this action.

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in their answer or otherwise available to them (*see* **Flagstar Bank v Bellafore**, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; **Grogg Assocs. v South Rd. Assocs.**, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; **Wells Fargo Bank v Karla**, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; **Washington Mut. Bank v O'Connor**, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; **J.P. Morgan Chase Bank, N.A. v Agnello**, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; **Ames Funding Corp. v Houston**, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In their opposing papers, defendants re-assert their pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendants contend that a question of fact exists with respect to the plaintiff's standing as the assignment of mortgage is defective and that there is no evidence that plaintiff was in physical possession of the note when the action was commenced. The court finds that the defendants' conclusory allegations fail to demonstrate the existence of questions of fact on the issue of standing on the part of the plaintiff. Here, the uncontroverted facts establish that plaintiff possessed the original note containing an indorsement in blank prior to the commencement date of this action and that the mortgage passed as an incident to the note upon the physical delivery of same. Accordingly, plaintiff's standing has been demonstrated.

With respect to their remaining affirmative defenses and counterclaims, defendants have failed to raise any triable issues of fact. Accordingly, the motion for summary judgment is granted against defendants Diana Dombroski and Charles A. Loiseau a/k/a Charles Loiseau.

That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. Upon submission of a proposed judgment of foreclosure and sale, plaintiff shall demonstrate sufficient cause why the complaint should not be dismissed as to said non-appearing, non-answering defendants as required by CPLR 3215(c).

Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (*see* **Green Tree Serv. v Cary**, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; **Vermont Fed. Bank v Chase**, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; **Bank of East Asia, Ltd. v Smith**, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]). The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the court.

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Dated: 1-20-15

Emily Pines
HON. EMILY PINES

 FINAL DISPOSITION X NON-FINAL DISPOSITION